

ICLC Submission to the NSW Law Reform Commission review of the *Anti-Discrimination Act 1977* (NSW)

The Inner City Legal Centre (ICLC) acknowledges the NSW Law Reform Commission invitation to provide submissions on the Terms of Reference of the *Anti-Discrimination Act 1977* (NSW) review.

For more than 40 years, the ICLC has stood amongst leading advocates for the LGBTQ+ community and sex worker community in NSW. We provide the only LGBTQ+ and sex worker specialist community legal services in NSW.

In 2018 the Trans and Gender Diverse (TGD) Legal Service was created in response to our experience with the specific and unique legal needs of trans and gender diverse people in NSW. Our lagging and confusing discrimination laws have been partially responsible for the creation of the TGD Legal Service and protections for this community are exclusionary, dated and often discretionary.

Sex Workers receive no specific protection against discrimination under the NSW Act and yet they are amongst the most discriminated against groups of people in our community. Accordingly, trans and gender diverse people and sex workers will be the focus of our submission.

The ICLC has not had capacity to respond to the Terms of Reference exhaustively. We defer to our trusted colleagues at PIAC, ACON, CLCNSW, the NSW Council for Civil Liberties and Equality Australia on some of the questions that impact all of us. We also note that Alex Greenwich's recommendations in the *Equality Legislation Amendment (LGBTIQ+) Bill 2023* substantially overlaps with this enquiry. Uncontroversial amendments ought to be swiftly adopted to preserve our scarce public resources

The ICLC is regularly, and correctly, called upon to comment on matters affecting the communities that we serve. As a small, community-based organisation we lack a dedicated policy and law reform position within our organisation. We fit in these consultations around our frontline work, however our clients must always come first and we always wish we had more time to work on policy. The ICLC would welcome any additional support and resourcing by the NSW Government to enable our full and equal participation in law reform discussions.

We wish to extend our thanks to Simone Pavett and Hannah Russell, who completed the bulk of this submission during their voluntary student placements at the ICLC.

Please direct any enquiries to

ICLC acknowledges the Gadigal People of the Eora Nation, the Traditional Owners of the lands on which we work. We pay our respect to Elders past and present.

Preliminary Submission on issues relevant to the terms of reference

1. Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

Yes.

The Act must be modernised and simplified and, at minimum, be brought into line with comparable jurisdictions. We support the *Equality Legislation Amendment (LGBTIQA+) Bill 2023*, which provides comprehensive recommendations. Transgender people and sex workers must not be left behind or stuck with poorly drafted carve-outs in the new Act.

2. Whether the range of attributes protected against discrimination requires reform

Yes.

Our submission builds upon the *Equality Legislation Amendment (LGBTIQA+) Bill 2023*, which introduces 'sex worker' as a protected attribute and provides protections against unlawful discrimination.

Sex workers are a substantial proportion of our clients. They experience amongst the worst stigma and discrimination that we see in our casework, however more often than not they are able to pursue a remedy under discrimination laws.

For example, sex workers experience discrimination in securing accommodation; whether that be entering into residential leases or seeking a mortgage to purchase a home. This is often the case even for sex workers on high incomes, as they are unable to provide the documents that landlords or institutions require and they are unable to demonstrate that their work is secure and ongoing.

As it stands, landlords and real estate agents can and do discriminate against sex workers, exposing them to a higher risk of homelessness.¹

The definition of a 'recognised transgender person' as currently stated in the Act is grossly out of step with contemporary understandings of transgender people. Transgender people are able to recognise themselves; they do not need the state to recognise them in order to be who they are – legally or otherwise. All references to 'recognised transgender person' in the act must be removed and replaced with 'transgender person'. This should include people who are non-binary.

Every week the ICLC receives an enquiries about the legislation of changing names and gender marker on a NSW birth certificate and the legislative requirement to 1) have undergone a sex affirmation procedure and 2) have had this procedure verified by two registered medical practitioners.

This excludes trans people who are unable to undergo surgical procedures, and those who do not deem a surgical affirmation procedure necessary to affirm their gender. Frequently we advise our clients that they are able to change their name but they cannot update their gender marker on their birth certificate. This is an absurd and humiliating situation for our clients.

A prohibition on use of irrelevant criminal records ought to be considered in a renewed list of protected attributes. Criminal records, relevant or otherwise can also substantially impact a persons capacity to enter into employment or access to goods and services eg. bank loans, insurance and superannuation. We a disproportionately high number of convictions among the sex worker and TGD communities.

¹ As addressed in Abigail Boyd, Anti-Discrimination Amendment (Sex Workers) Bill 2020, Second Reading Speech

Further, many of the ICLC sex worker clients seek advice beyond their occupation – they present as carers, parents and family members who have financial and family obligations. A reformed Act would extend protection to people who are associated with sex workers, including the children and families of sex workers and other people for who sex workers have caring responsibilities for.

3. Whether the areas of public life in which discrimination is unlawful should be reformed

Yes.

Defamation laws are not sufficient to protect our clients from vilification discrimination on the internet, on social media or in the mainstream media. We would advocate for increased protection in media as a form of ‘public life’.

4. Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

No.

The *Equality Legislation Amendment (LGBTIQA+) Bill 2023* speaks to this.

5. The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

The ICLC is observing an alarming increase in vilification against trans people, with much of the hateful behaviour taking place online. There are few protections under existing discrimination laws for online abuse and the criminal law response is (in our experience) underwhelming.

We have been assisting our clients to apply for APVOs as this is often the only available remedy for trans clients experiencing harassment and vilification. This is always after a complaint to police has not succeeded.

NSW became the first place in the world to “decriminalise” sex work in 1979. In 1995 most criminal offences relating to sex work were decriminalised. There are current offences that still exist in NSW in 2023. *The Summary Offences Act 1988* (NSW) has retained certain “prostitution” offences under Part 3 of the Act.

These include; *an adult living off the earnings of another person, advertising prostitutes or premises used for prostitution, allowing certain premises such as massage premises, physical exercise or photography studios to be used for sex work, take part in an act of prostitution within view of a school, hospital church or dwelling.*

The inconsistencies between the “decriminalisation” of sex work and current offences under criminal law demonstrates that NSW has only committed to a partial decriminalisation. Total decriminalisation must be included as part of the current review of the *Anti-Discrimination Act*.

6. The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

Sexual Harassment is not adequately covered in the current Act. With a lack of protection for persons experiencing sexual harassment, particularly sex workers, there is no available remedies for those who experience of sexual harassment.

We note our trans clients also report disturbingly high levels of sex and/or gender based harassment.

Much of this conduct occurs on the street or not in the course of obtaining goods or services. Therefore our clients have no recourse under current discrimination laws.

7. Whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

Yes, in our experience, our sex worker and trans clients experience gross discrimination in public life, especially online. These clients would benefit from positive obligation as a preventative measure. Along with positive obligations, the Anti-Discrimination Board of NSW should be provided additional powers to effectively and efficiently investigate harassment and vilification in community. So often our clients only option is to report for acts of harassment and vilification to the police, whom they are often reluctant to engage with noting the well documented issues of police violence towards trans and sex worker communities.

8. Exceptions, special measures and exemption processes

The ICLC is unable to respond comprehensively to this statement. We defer to the expertise of our colleagues at PIAC, ACON, NSWCCCL and Equality Australia.

9. The adequacy and accessibility of complaints procedures and remedies

Currently complaint procedures and remedies are inadequate. It takes a huge amount of courage, time and personal hardship for a complainant to bring their issue before the ADB. The available remedies often are not worth it for the individual; the stressful and traumatic process is often difficult to justify, especially if the best outcome is an apology or a nominal amount of financial compensation.

We wish to promote to our clients a robust system that provides both accessible complaint procedures and adequate remedies.

We are concerned about the use of non-disclosure agreements in this jurisdiction, which has previously been addressed by the Scarlet Alliance.²

10. The powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

Resourcing of the ADB should be increased, along with positive powers to investigate discrimination and issue civil penalties where appropriate. Currently our clients are falling through the cracks and discriminatory parties are not held accountable for their conduct. The ICLC appreciates any potential mechanism to address systemic discrimination is multifaceted and complex.

The ICLC proposes increasing the availability and severity of penalties for individuals, organizations and institutions who engage in discriminatory conduct. This will serve two purposes; first deterrence in engaging in such conduct, and secondly, compliance with the Act through the adoption of anti-discrimination policies and practices to avoid severe penalties. This proposal is bolstered by the current conciliation process not serving the complainant. With the current cap on

² Scarlet Alliance, *Anti-Discrimination & Vilification Protections for Sex Workers in Australia*, 2022.

compensation orders by NCAT being \$100,000, complainants will unlikely see a settlement anywhere near that amount, and there are many hoops to jump through before that stage. With respect to the issue of transparency and accountability, the ICLC supports the proposal that ADB provides and maintaining a public register of complaints.³ This would further support our solicitors to deliver informed legal advice to prospective complainants.

12. The interaction between the Act and Commonwealth anti-discrimination laws

The ICLC supports harmonisation between State and Commonwealth Anti-Discrimination laws, and further supports the introduction of a federal Charter of Human Rights.

There are multiple inconsistencies in existing definitions and inclusion for LGBTQI+ people and sex workers between the NSW Act and the *Sex Discrimination Act 1984* that ought to be addressed as a matter of priority in this review.

13. Any other matters the Commission considers relevant to these Terms of Reference.

The ICLC values law reform and our ability to meaningfully participate in these discussions. We are not adequately resourced to participate beyond our frontline work, which is a shame as our knowledge of the client experience is hard to match. We are in a unique position to identify where the law is not working well for our clients, and advocate for systemic change to improve the law and its impact on disadvantaged communities.

Increased resourcing would support the establishment of a dedicated policy and law reform team for our service.

Thank you for considering our submission. We observe this long overdue review of the *Anti-Discrimination Act 1977* (NSW) with great interest.

Yours sincerely,

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Managing Principal Solicitor

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